IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 11 of 1995

with

CRIMINAL APPEAL No 118 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GANESH NANJI HARIJAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 11 of 1995
   MR UA TRIVEDI for Appellant
   MR KT DAVE, APP for Respondent
2. Criminal Appeal No. 118 of 1995
   MR KT DAVE, APP for Appellant
   NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

and

MR.JUSTICE A.L.DAVE

Date of decision: 07/08/2001

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. Appellant - original accused no. 3 of Sessions Case No. 37/93 has preferred Criminal Appeal No. 11/95 against the order of conviction recorded by Additional Sessions Judge, Junagadh, against him for an offence punishable under Section 302 of Indian Penal Code, sentencing him for life and to pay a fine of Rs. 5,000/(in default of payment of fine, to undergo two months' imprisonment). The State has preferred Criminal Appeal No.118/95 against the judgment delivered by the Additional Sessions Judge, Junagadh, in Sessions Case No. 37/93 whereby respondents in this Criminal Appeal No. 118/95 were acquitted. Both the appeals are arising out of the same judgment and hence, both the appeals are disposed of by this common judgment.

#. Jayaben - PW No. 3, widow of deceased Jivan lodged FIR exh. 49 before Junagadh Police Station on 9.1.1993 at about 10.00 p.m., wherein it is stated that she was residing with the deceased, mother-in-law Somiben, two sons namely Ramji and Sanjay and four daughters namely Ratan, Premila, Prabha and Bharti. She stated that her husband is working as daily Mason. One Harijan Nanji Soma, residing in her neighbourhood called upon the deceased Jivan to carry out the work of plaster of wall before about 12 days. The work of plastering was almost completed. However, for the remaining work, Nanji was insisting that the deceased must complete the work. Her husband was not paid money for the work that was carried out and therefore, her husband stated that he was engaged in plaster work at other places and after that work is completed, he will complete the work at the house of Nanji. It is on this ground that there was altercation between the two. On the date of incident i.e. 9.1.93 at 8.00 p.m., she was sitting in the Osari with her mother-in-law Somiben, when her husband Jivan arrived from the site and was standing in the street, at that time, Nanji Soma stated that he (Jivan) must complete the work of plaster. Her husband stated that first he should make the payment for the work carried out earlier and thereafter he would commence the work which was left out. Listening this, Nanji Soma was enraged and started abusing. In the meanwhile, Ganesh - appellant of Criminal Appeal No. 11/95, original accused no. 3 came with a knife, the deceased Jivan was caught hold by Nanji

Soma and his wife Ramubai. Ganesh delivered two or three blows on the right abdomen and two or three blows on the right side of the chest. It is stated that blows were delivered with force. Hariyo - son of Nanji came with a stick and delivered stick blows. In the meanwhile, Ganesh delivered about 5 blows by means of knife. Jayaben in her FIR stated that Nanji caught hold of both the hands of Jivan, while Ramuben caught hold the deceased. Jivan - her husband was shouting. Others went to his rescue but all the four accused went to their house. Her husband had bleeding injuries. One Kara Sajan called a rickshaw in which her husband was removed to the hospital.

#. When the information was lodged, her husband was in the hospital. The deceased succumbed to the injuries and therefore, subsequently, an offence punishable under Section 302 of Indian Penal Code came tobe added. On the information, the police commenced the investigation and on being satisfied that prima facie material exists against the appellant of Criminal Appeal No. 11/95 and the respondents of Criminal Appeal No. 118/95, the police filed charge sheet before the Chief Judicial Magistrate, Junagadh, who committed the accused to the Court of Session. Charge Exh. 3 was framed on 2.5.94 against all the 4 accused to which they pleaded not guilty. The appellant - Ganesh was tried for an offence punishable under Section 302 of I.P.C., while others were tried for an offence punishable under Section 302 read with Section 34 of I.P.C. In the alternative, they were also charged and tried for an offence punishable under Section 302 read with Section 114 of I.P.C. Original accused no. 1 Nanji Soma was also tried for an offence punishable under Section 504 of I.P.C. On appreciation of oral as well as documentary evidence led by the prosecution and submissions made by the learned advocates for rival parties, the trial Court convicted the accused no. 3 for an offence punishable under Section 302 of I.P.C. and passed an order of sentence as aforesaid. However, the trial court found that there was no sufficient material against original accused nos. 1, 2 and 4 and, therefore, acquitted the accused nos. 1, 2 and 4. These appeals are filed against the said orders of conviction and acquittal.

#. Mr. Umesh Trivedi, learned counsel, appearing for the appellant in Criminal Appeal No. 11/95 submitted that the case rests only on interested witnesses. The prosecution has not examined other witnesses though they were available. It was further submitted that the witnesses could not have seen the occurrence as they were

in the house. It was further submitted that the story put before the Court is highly improper. He further submitted that the genesis of the occurrence is doubtful. Mr. Trivedi further submitted that the case can be divided into two parts; (i) involving accused no. 3 and (ii) involving accused nos. 1, 2 & 4. He submitted that if the Court has not accepted the evidence with regard to accused nos. 1,2 and 4, there was no earthly reason to accept the evidence against the original accused no. 3. In his submission, the entire case should have been rejected. Mr. Trivedi further submitted that how the accused came in possession of the knife is also not proved and therefore, the accused must be given benefit of doubt. He tried to suggest that on account of the medical evidence produced on the record through Dr. Joshi - PW 1 and Dr. Saparia - PW 15, the version put forward with regard to injuries sustained by the accused becomes doubtful and if that be so, the accused should be given benefit of doubt. The trial court considered the medical evidence and arrived at a conclusion that the offence punishable is under Section 302 of I.P.C. In all, there were 9 incised wounds. The Medical Officer in certificate - Exh. 12 noted the injuries found on the person of Jivan while examining at about 8.30 p.m. on 9.1.93. The injuries noted are as under.

(i) Incised wound - 3 inches long on chest Rt. side just above Rt. nipple size 3" x 1" by cavity deep going downwards and medially margins sharp.
(ii) Incised wound on chest in Rt. side I-C scam oblique going downwards and medially margins sharp. 2" x 1" x cavity deep.
(iii) Incised wound on Rt. Hypochondrium 2" long omentum coming out of wound - oblique direction margins sharp.
(iv) Incised wound just over umbilicus at 11 O'Clock position oblique direction 2"x1"xcavity deep all margins sharp.
(v) Incised wound on back on on middle at level of T-2 2" x 1" x Bone deep, oblique direction going downwards and laterally margins sharp.
(vi) Incised wound on lower angle angle Rt. Scapula 1/2" x 1/2" bone deep/direction going downwards and medially.
(vii) Incised wound on medial angle on Rt.Scapula 1/2" x 1/2" and muscle deep/direction.
(viii) Incised wound on lateral angle on Rt. Scapula 2" x 1/2" x cavity deep going down and medially/direction.
(ix) Incised wound 1 cm. above injury no. 7 / direction 1 cm. x 1 cm. x muscle deep/direction

going downwards and laterally.

X-ray shows fracture (of) 4th rib S/b Radiologist.
Above injuries can be caused by hard sharp object.
Further details may be got from Ahmedabad Civil Hospital.

#. It appears that soon after noting the injuries and the First Aid, the injured Jivan was advised to be removed to Ahmedabad. The doctor was shown muddamal knife and he opined that the injuries could be caused by muddamal knife. It seems that the injured was removed to Gondia Hospital at Rajkot, where he was treated. His condition was serious. It was found absolutely necessary to perform the operation on the person of the deceased Jivan. At about 9.00 a.m. surgery was performed by opening the stomach as well as the chest. During the treatment, Jivan died in the hospital. Dr. Vasavda - PW 18 who performed surgery was subjected to the cross-examination on various aspects. As the injured succumbed to the injuries, post mortem was performed by Dr. Jayantilal Saparia - PW 15 on 10.1.93 at about 4.45 p.m. He noted the injuries found on the person of the deceased. Reading the evidence of all the three doctors, it is clear that in view of the injuries, the injured expired. The doctor specifically stated that the injuries found on the person of the deceased were sufficient in ordinary course of nature to cause death.

#. It was argued that it is not the case of the prosecution that a single injury was sufficient in ordinary course of nature to cause death. In fact, the Medical Officer Dr. Saparia stated that the out of the injuries noted, on account of the individual injury, a person in ordinary circumstance would not succumb to the injuries. He denied the suggestion that the injuries were not such which would cause death in ordinary circumstance. We have read the medical evidence and it is clear that the deceased met unfortunate death on account of the injuries caused on his person and the injuries caused on the person were sufficient in ordinary course of nature to cause death. It is not necessary that each individual injury should be capable of causing death. If solitary injury would have been caused and the person would have survived, there would not have been question of conviction for offence punishable under Section 302 of I.P.C. As we are dealing with the medical evidence, we would also indicate that the injuries were noticed by the Medical Officer on the person of the

accused when examined. Dr. Joshi - PW 1 examined accused no. 3 Ganesh Nanji at about 11.00 p.m. He disclosed before the Medical Officer that in a scuffle, he sustained injuries. The Medical Officer pointed out that two injuries were noticed. (i) Lacerated wound on the forehead Lt. side 1 cm. x 1 cm. (ii) There was a cut wound on the part joining second and third finger on the left palm of .1 cm. x .1 cm. which was skin deep. The Medical Officer expressed an opinion that injury no. 2 could be sustained by a person while causing injuries 8 or 9 in numbers by inflicting blows with a knife in his hand. The injury on the forehead can be caused on account of brushing with some hard object. The Medical Officer was questioned with regard to injuries sustained by the accused. He positively stated by looking at the muddamal article no. 1 - knife, that by holding the weapon in hand, if injuries are caused to other person, the person inflicting blows would sustain injury as noted. It is required to be noted that the learned counsel relied upon the evidence of Dr. Saparia who indicated different version than that of this Medical Officer. He was shown muddamal article 1 - knife and question was put to him that if muddamal article no. 1 knife is used for causing the injuries, then by holding the handle of weapon would such injuries be caused or not? To this, the Dr. stated that if the knife is held by handle, then there cannot be sharp cutting injury. He stated that by holding the knife in such a manner even if 10 blows are inflicted, there cannot be injury which could be caused by sharp cutting weapon on the palm. It is an admitted fact that this Medical Officer did not examine the person who sustained the injuries. A hypothetical question has been put. It is also required to be noted that a specific question was put that a person by holding knife in a hand if he causes injuries, while delivering 8 to 10 blows, then could the injury be found in the nature of sharp cutting wound in the hand of the person causing the injuries. The other Medical Officer Dr. Joshi PW 1 who examined the patient and who saw the knife definitely stated that such injuries could be caused and therefore, we find no substance in the contention raised by the learned counsel.

#. Before us, submission was also made that the injuries could not have been caused by the weapon. However, it is pointed out that a suggestion has been denied that injury nos. 1 to 4 as noted could be caused if both the sides were sharp. This witness i.e. Dr. Joshi was shown muddamal article no. 1 - knife. Only one side was sharp but the front portion was pointed one and pointed portion was sharp on both the sides. He definitely stated that

the injury nos. 1 to 4 could be caused by muddamal article no. 1 - knife. In view of this evidence, it is clear that the deceased met with an unfortunate death on account of the injuries caused on his person by the accused - appellant Ganesh and the injuries were sufficient in ordinary course of nature to cause death and therefore, the offence punishable under section 302 of I.P.C. is committed by the accused.

#. It was submitted by learned counsel that in the instant case, as only interested witnesses are examined, the evidence should be rejected. The Apex Court has pointed out on various occasions that the evidence of interested witnesses is required to be scrutinised carefully and cautiously and is not to be rejected merely on the ground that the witness is a relative of the deceased or the injured. If the oral evidence gets corroboration from other independent evidence, there is no reason why not to accept the evidence. Through the oral testimony if the witnesses are narrating incident and the testimony suffers from no infirmity, then there is no reason for not accepting the same. In the instant case, the learned counsel for the appellant, while reading the evidence found it difficult to suggest the Court that the witnesses could not have seen the incident because during the cross-examination, questions were put and the witnesses have stated that they were in the street. Originally before altercation, two witnesses were in the house. We have examined the map which is produced on the record. If the map - Exh. 17 is perused, it becomes clear that the incident took place on the road. From the map it is very clear that on the road on both the sides, there are houses. The houses of the accused as well as prosecution witnesses are adjoining to each other i.e. there is a common wall between the two houses. From the map it is also clear that from the road, one has to enter Osari. Osari portion is not covered by wall but covered by a wooden chips and thus not completely closed. After the Osari, one can enter the room of a house. On the road adjoining to the house of the accused, there is a washing place admeasuring 3 x 3 ft. and at a distance of 2 feet therefrom, blood-stains were found. The incident took place at this place. The learned counsel for the appellant tried to suggest that a person sitting in the Osari could not have seen the occurrence. One would take less than half a minute to come in the street from the Osari. Only one has to come out from the Osari to be on the road. The incident lasted for longer period. It was not over within a moment. First there was altercation between the two. The house being just adjacent, attention of the

members of the family naturally must have been drawn in view of this hubbub or the altercation and they must have come out. Osari had a door and was covered by wooden chips and not the brick wall. Keeping this in mind, if we read the evidence to see whether the witnesses could have witnessed the incident or not. Jayaben - PW 3 stated whatever she stated in the FIR, i.e., the manner in which the incident took place, is true. She stated that at the time of occurrence, it was not dark. Inside the room, light was on. Just opposite the house, there is a light pole and that light was on. It is also stated by her that below the ceiling in the Osari, there was also a lamp which was on. It is also required to be stated that the witnesses and the accused are residing at the same place since number of years and are known to each other very well. It is not the case that between the two families, there were disputes and therefore, the interested witnesses were interested in involving the accused persons falsely. As a matter of fact, work was given by the accused to the deceased and there was no dispute of any nature whatsoever. It is also required to be noted that the incident is not witnessed from a long distance. The incident took place just outside the house and the witnesses were in the street and therefore, there is no question of raising any doubt about the identity. In the cross-examination, she stated that her husband arrived from the work. He met the accused Nanji. Nanji was talking with Jivan and 4 persons were sitting in the street. At that time, in all 6 persons were present.

#. Witness Ratanben PW 4 corroborated the prosecution version. She stated that her father sustained injuries at the hands of the accused. She stated that Ganesh uncle delivered 9 blows by means of a knife. The manner in which witness has stated "Ganesh Uncle" indicates that they were close to each other and no enmity was there. She stated that at the time of incident, she was playing with her brother in the street and her mother was in the street. She narrated the incident and it is clear that her presence cannot be doubted. Somiben - PW 5 mother of the deceased Jivan stated before the court in her cross-examination that since about 20 years they are staying. The family members of the accused and the prosecution witnesses are staying in the neighbourhood. In the cross-examination, she stated that her son Jivan attended the marriage of the accused Ganesh. A suggestion is made that even invitation was not extended, but the same was denied. In the cross-examination, she stated that when she came out from the Osari, she saw that Jivan was caught hold and was being beaten. She has described the incident. Thus, the witnesses were not inside the room, but were in the Osari and they came out

immediately on hearing the hubbub. The evidence of Ratanben reveals that she was playing in the street with her younger brother. The incident has been narrated in the natural manner with a ring of truth. It is difficult to doubt the testimony of the witnesses.

##. It is required to be noted that the trial court accepted the evidence of Somiben - PW 5 being more reliable and acceptable. The trial court also accepted the evidence of Jayaben - PW 3 and Ratanben - PW 4. The trial court also accepted the corroborative piece of evidence namely the medical evidence of Dr. Joshi - PW 1, Dr. Saparia - PW 15 and Dr. Vasavda - PW 18 and considering the medical evidence, certificates, postmortem etc. it is clear that nine blows were delivered. As in succession 9 blows were delivered, the trial court has held that it is difficult to say that there was no intention on the part of the accused to cause death of the deceased Jivan. On account of plastering of wall, there was discussion or altercation between Nanji and Jivan and there was no earthly reason for the appellant - Ganesh - original accused no. 3 to come with a knife and deliver blows all of a sudden. In our view, the trial court has rightly held the accused no. 3 guilty for an offence punishable under Section 302 of I.P.C.

##. In view of the oral evidence which we have discussed, it leaves no doubt that the prosecution has successfully proved the guilt by leading cogent, convincing and reliable evidence. The trial court has rightly held the appellant - accused no. 3 guilty for the offence punishable under Section 302 of I.P.C. Resultantly, the Criminal Appeal No. 11 of 1995 filed by the accused no. 3 Ganesh must be dismissed and is so dismissed.

##. Merely because the trial court has also held that merely because the accused nos. 1,2 and 4 were present, it cannot be said that they have abetted in any manner. So far as the intention is concerned, it cannot be said that others also shared the common intention. In fact, there is no evidence that others knew that Ganesh accused no. 3 would go inside the house, will bring a knife and will deliver blows in quick succession. The injuries caused by means of a knife on the person of the deceased were sufficient in ordinary course of nature to cause death. All these injuries were inflicted by accused no. 3.

##. In our view, the trial court has rightly acquitted

the accused and therefore, we do not find any merits in the Criminal Appeal preferred by the State and therefore, the Criminal Appeal No. 118 of 1995 stands dismissed.

##. In view of what we have stated hereinabove, the order of conviction and sentence recorded by the learned Additional Sessions Judge, Junagadh in so far as accused no. 3 is concerned, it is hereby confirmed and order of acquittal is not disturbed. Both the appeals are dismissed.

[B.C. PATEL, J.] [A.L. DAVE, J.]

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